IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE GOVERNOR RE: WHETHER ARTICLE III, SECTION 20(A) OF THE FLORIDA CONSTITUTION REQUIRES THE RETENTION OF A DISTRICT IN NORTHERN FLORIDA, ETC.

CASE NO.: SC22-139

BRIEF OF INTERESTED PERSONS COMMON CAUSE FLORIDA AND FAIRDISTRICTS NOW

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SUMMARY OF ARGUMENT

The Florida Constitution does not provide the Governor with the right to ask this Court to advise him whether he should veto a hypothetical congressional redistricting bill that may, or may not, be enacted by the Legislature. Since 1887 it has been unchallenged that this Court's jurisdiction under the Florida Constitution to issue advisory opinions to the Governor does not extend to questions concerning the legislative process, including whether the Governor should sign or veto legislation. The Governor's duty to approve or veto—authorized by the article of the Constitution devoted to the Legislature—is part of the process by which a bill becomes law and is not part of the Governor's duty to enforce the laws that actually exist. Any other result would implicate the constitutional principle of separation of powers by entangling the Court in the legislative drafting process. The Constitution does not vest the Court with jurisdiction to issue an advisory opinion in response to the Governor's February 1, 2022 request.

STATEMENT OF INTEREST

Pursuant to the Court's Order, dated February 2, 2022, interested persons Common Cause Florida and FairDistricts Now

(together, the "Interested Persons") respectfully submit this brief addressing whether the Governor's February 1, 2022 request (the "Request") seeking an advisory opinion is within the purview of article IV, section 1(c) of the Florida Constitution and if so whether the Court should provide an opinion in response to the Request.

Common Cause Florida is a nonpartisan, nonprofit grassroots organization dedicated to upholding the core values of American democracy, with members and supporters throughout Florida, including in Florida's current congressional district 5. Common Cause Florida works to create open, honest, and accountable government that serves the public interest and to empower all people in Florida to make their voices heard in the political process.

FairDistricts Now is a nonpartisan, nonprofit organization that works to ensure the full and fair implementation of the Fair Districts Amendments, art. III, §§ 20 and 21, Fla. Const. It also provides support to Floridians who want to be sure that Florida's 2022 districts are drawn according to the law—to benefit the people of Florida. FairDistricts Now's mission is to educate the public about the importance of fairness and transparency in redistricting.

ARGUMENT

I. The Request Is Not Within the Reach of Art. IV, Sec. 1(c)

The Florida Constitution provides a narrow, carefully circumscribed mechanism by which the Governor—but not the Legislature—may request an advisory opinion from this Court. This narrow constitutional provision applies only when the request seeks "the interpretation of any portion of [the Florida Constitution] upon any question affecting the governor's *executive* powers and duties." Art. IV, § 1(c), Fla. Const. (emphasis added). That is not this Request.

Rather, this Request seeks an advisory opinion purportedly to inform his possible, hypothetical, exercise of his legislative veto power *on a bill that has not yet been drafted, much less passed by both houses of the Legislature or presented to the Governor for signing*. In this context, it is well-settled that the Governor's query about his veto power asks about a legislative function not susceptible to an advisory opinion. Such a request for guidance from this Court before a bill is passed by the Legislature and signed by the Governor is improper.

A. The Governor's Veto Power is Legislative in Nature and Outside this Court's Advisory Opinion Jurisdiction

The legal question the Governor asks this Court to answer is whether Article III, Section 20(a) of the Florida Constitution—which sets forth the standards for establishing congressional district boundaries—requires the retention of a version of what is currently congressional district 5. Specifically, the Governor seeks a legal opinion to assist him "in deciding whether to exercise [his] veto power once the Legislature's congressional redistricting bill is presented to [him]." (Request at 2.)

As the Governor acknowledges, the last (and only other) time a Governor requested an advisory opinion on a similarly hypothetical constitutional inquiry this Court summarily rejected the Governor's request. *In re Exec. Commc'n Concerning Powers of Legislature*, 6 So. 925 (Fla. 1887). There, the Governor requested an opinion as to "what character of bills" would be violative of the Florida Constitution, which the Governor would therefore be obliged to "disapprove," *i.e.*, veto. *See id.* This Court found that because the question concerned the Governor's veto power, it did not "affect[]his executive powers and duties," and was outside the Court's advisory opinion jurisdiction.

The Court began its analysis by noting that, unlike some other States that permit their legislatures to ask the courts for an advisory opinion, in Florida "our constitution restricts such right to the governor alone." *Id.*[1] Drawing upon the importance of that distinction, the Court reasoned that "[a]ny duty imposed by the constitution on the governor with reference to a bill, *before it becomes a law, is not an executive duty*." *Id.* (emphasis added). "The enactment of laws is a legislative duty"—for which the Court cannot render advisory opinions. "[A]ny act which is an essential prerequisite" to the enactment of a law "is legislative" and is performed by the Executive "as a part of the lawmaking power, and not as the law-executing power." *Id.* The Court concluded that rendering an advisory opinion on the legality of a proposed bill before it became law would be "unauthorized by the constitution." *Id.* Thereafter, for 135 years, no Governor has sought such an opinion from this Court, and for

[1] The constitutional provision concerning gubernatorial requests for advisory opinions is substantively unchanged since 1887, except that in 1968 the Constitution was amended to permit interested persons to be heard on the questions presented in such requests. *Compare* art. IV, § 13, Fla. Const. (1885), *with* art. IV, § 1(c), Fla. Const. Notably, no amendment ever enabled the Legislature to seek an advisory opinion.

good reason. Its logic applies with equal force today: for purposes of this Court's advisory opinion jurisdiction, the Governor's veto power is legislative, part of the lawmaking process, rather than executive. This conclusion is confirmed by the reports that the House itself will be joining the Governor's Request—asking this Court for help in drafting legislation.

A plain reading of the Florida Constitution identifies the veto power as a part of the legislative process and not as relating in any way to the Governor's duty to see that the laws are faithfully executed. The procedure for the Governor's approval or veto of legislation is included in Article III (the Legislature), not Article I (Executive). *See* Art. III, § 8, Fla. Const. As this Court noted in 1887, the phrase "executive powers and duties" for purposes of its advisory opinion jurisdiction means powers and duties relating only to "the laws as they exist." *In re Exec Commc'n*, 6 So. at 925.

While there are circumstances in which the Court has referred generally to a gubernatorial veto as an "executive power,"[2] the only

[2] The cases cited by the Governor for the proposition that the veto is an "executive power" arise in completely different circumstances, *i.e.*, where there is a question about the validity of an actual veto that has occurred. With one exception, none arise in the context of an advisory

relevant question here is whether the veto is an "executive power and duty" for purposes of this Court's advisory opinion jurisdiction, when there is no comparable jurisdiction to advise on legislative powers and duties. Of course, the Governor has the "power" to veto legislation and he is the chief executive of the state, but those facts do not mean a veto is any less a part of the law-making process and allow this Court to opine on the legality of a hypothetical bill the Legislature may, or may not, pass.

B. The Request Is Not Justified by the Governor's Duty to "Take Care" the Laws Are Faithfully Executed

In passing, the Governor also attempts to base this Court's jurisdiction to render an advisory opinion on his duty to "take care

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opinion. *See, e.g.*, *Chiles v. Child. A,* 589 So. 2d 260, 264 (Fla. 1991) (discussing constitutionality of state budget reapportionment law, not in advisory opinion context); *Brown v. Firestone,* 382 So. 2d 654, 672 (Fla. 1980) (invalidating certain gubernatorial vetoes, not in advisory opinion context); *Owens v. State,* 316 So. 2d 537, 538 n.4 (Fla. 1975) (upholding constitutionality of state parole statute, not in advisory opinion context); *Green v. Rawls,* 122 So. 2d 10, 13 (Fla. 1960) (affirming State Budget Commission's employee salary decisions made after governor had vetoed appropriations bill, not in advisory opinion context). The one case that involved an advisory opinion sought an opinion about an enacted, not a hypothetical, law. *In re Advisory Opinion to the Governor,* 239 So. 2d 1, 9 (Fla. 1970) (upholding constitutionality of an *enacted* appropriations law and discussing constitutional limitations on a legislature's interference with the exercise of gubernatorial veto).

that the laws be faithfully executed," Art. IV, § l(a), Fla. Const. This Court rejected a similar argument in 1887 and it is no more persuasive today. As the Court wrote, "[t]he law must be enacted according to all the terms prescribed by the constitution, before the duty of executing it can exist." *In re Exec. Commc'n*, 6 So. at 925.

Permitting the "take care" clause to justify advisory opinions about the form of legislation that the Legislature may, or may not, enact would dramatically expand the potential scope of gubernatorial requests, with no discernible limiting principle. If the Governor's argument were accepted, a Governor could ask this Court to opine about each and every matter the Legislature was considering, now or in the future—even though this Court has no jurisdiction to render advisory opinions to the Legislature. A Governor would be able to request judicial review of every idea that a legislator proposed, and potentially involve the Court endlessly in advising on bill drafts for the Legislature, rather than limiting itself to reviewing laws that the Legislature has passed and the Governor has signed. Adopting the Governor's position would open the floodgates for any Governor to challenge any bill at any stage of the legislative process.

C. This Request Is Unlike All Other Gubernatorial Requests for Advisory Opinions in Florida Since 1887

The Governor bases his Request on his veto power and on his duty to take care that the laws be faithfully executed. Yet, he asks no questions about the scope of the veto power. Nor does he identify any law about whose execution he is uncertain. Nothing affects his unquestioned right to exercise those powers. Rather, he asks for wide-ranging guidance on issues that do not now exist—questions relating to hypothetical maps for new congressional districts, even though no such maps have yet been enacted by the Legislature or presented to him. Specifically, the Request asks:

1. "whether the Florida Constitution's non-diminishment standard mandates" a congressional district resembling the current congressional district 5 (Request at 4);

2. for "guidance on what the non-diminishment standard does require" (*id.* at 5); and

3. "for clarification from this Court on what constitutes a proper benchmark for determining whether a minority group's ability to elect a candidate of its choice has been diminished." (*Id.*)

The broad scope of this Request, largely untethered to any facts, is unprecedented in the last 135 years. This Court's prior advisory opinions to the Governor exclusively address *narrow questions*

suitable for resolution without a record and related to interpretation of existing legislation or the scope of indisputably executive functions. Opinions from the past two decades illustrate this.[3] Indeed, the current Governor's previous request for an advisory opinion underscores the impropriety of his current Request. In 2020, the Governor asked this Court to opine on a "narrow question" interpreting language in a newly-enacted provision of the Florida Constitution. *Advisory Opinion to Governor re Implementation of Amend. 4, The Voting Restoration Amend.*, 288 So. 3d 1070, 1075 (Fla. 2020). That request was proper and susceptible of an answer. Not surprisingly, the Governor makes no effort to call this Request

[3] *See*, *e.g.*, *Advisory Opinion to Governor re Implementation of Amend. 4, The Voting Restoration Amend.*, 288 So. 3d 1070, 1074 (Fla. 2020) (interpretation and implementation of amendment to the Florida Constitution); *Advisory Opinion to Governor re Jud. Vacancy Due to Resignation*, 42 So. 3d 795, 796 (Fla. 2010) (Governor's responsibility to fill court vacancies); *Advisory Opinion to Governor re Comm'n of Elected Judge*, 17 So. 3d 265 (Fla. 2009) (executive authority to commission a judge); *Advisory Opinion to Governor re Appointment or Election of Judges*, 983 So. 2d 526, 528 (Fla. 2008) (Governor's obligation to fill court vacancy); *Advisory Opinion to Governor re Jud. Vacancy Due to Mandatory Ret.*, 940 So. 2d 1090, 1091 (Fla. 2006) (same); *Advisory Opinion to Governor re Sheriff and Jud. Vacancies Due to Resignations*, 928 So. 2d 1218, 1219 (Fla. 2006) (Governor's obligation to fill vacancies); *Advisory Opinion to Governor re: Appointment or Election of Judges*, 824 So. 2d 132, 133 (Fla. 2002) (Governor's obligation to fill court vacancy).

"narrow." It is not. The Court has no jurisdiction and no factual basis on which to issue an advisory opinion addressing multiple hypothetical constitutional questions concerning a congressional reapportionment bill that does not exist.

II. The Court Should Not Provide an Opinion in Response to the Request

A. The Request Violates the Separation of Powers

The Governor's Request should be denied for another fundamental reason: acting to answer the Governor's question here would improperly implicate the separation of powers. Art. II, § 3, Fla. Const. An opinion from this Court in the middle of the legislative process would necessarily interfere with the Legislature's exclusive authority to craft the laws. While the maps the Legislature might enact remain entirely hypothetical, the threat that the Request for an advisory opinion will draw the Court into the legislative process is not hypothetical. The Legislature is understandably reluctant to act when this Court might issue an opinion affecting its map-drawing powers. As a result, the Speaker of the House has stated that the body is waiting for the advice of this Court before proceeding and

House meetings on the congressional map have been canceled.[4] Indeed, there are reports that the House will file papers as Interested Persons asking for guidance in drafting legislation. This Court should decline that invitation.

After the Fair Districts Amendments were adopted, this Court reaffirmed its longstanding strong warnings against usurping the Legislature's primary responsibility for reapportionment:

> [W]e emphasize that legislative reapportionment is primarily a matter for legislative consideration and determination. Judicial relief becomes appropriate only when a legislature fails to reapportion according to federal and state constitutional requisites. … *[T]he fundamental doctrine of separation of powers and the constitutional provisions relating to reapportionment require that we act with judicial restraint* so as not to usurp the primary responsibility for reapportionment, which rests with the Legislature.

In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 606 (Fla. 2012) (quoting *In re Apportionment Law–1972*,

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[4] *See, e.g.*, Caden DeLisa, "Redistricting stalls in Florida Supreme Court," The Capitolist (Feb. 2, 2022) (Florida House "has committed to staying put on current redistricting negotiations until the Supreme Court addresses DeSantis' letter"); Mary Ellen Klas, "Legislature approves its own redistricting maps as DeSantis seeks court ruling," Miami Herald (Feb. 4, 2022) ("House Speaker Chris Sprowls … said the court opinion will be helpful for legislators to have 'more clarity … on that point prior to addressing the congressional map.'").

263 So. 2d 797, 799–800 (1972)) (emphasis added).

Notably, the Florida Constitution has been amended many times, but no amendment has been added to empower the Legislature to seek an advisory opinion before enacting legislation. As this Court noted in 1887 and is true still today, several other states have such provisions, but Florida does not.[5] Yet that is precisely what the Governor asks the Court to do here: to issue an advisory opinion, ostensibly for his benefit, but plainly one that, if issued, will impact the Legislature as it draws new congressional maps. The Legislature cannot lawfully pose such questions to this Court; the Governor should not be able to do what the Legislature cannot. Nor can the Legislature grant this Court jurisdiction it does not have by piggy-backing on the Governor's Request and filing comments now.

The Court may not involve itself in this way in the legislative process. Instead, any judicial review of congressional maps must be accomplished through the normal process, which cannot begin until

[5] Legislatures may request advisory opinions in Alabama, Colorado, Delaware, Maine, Massachusetts, Michigan, New Hampshire, and Rhode Island. *See* Lucas Moench, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. Rev. 2243, 2246 & n.35 (2018) (collecting state authorities).

the congressional maps are enacted into law. Only then can a challenge be brought in the lower courts and proceed to this Court through the appellate process and on a full evidentiary record below.

B. The Fact-Intensive Nature of the Governor's Request Demonstrates Why the Court Should Not Respond

The Court should decline to answer the Governor's Request because proper consideration would require a fact-intensive inquiry into the details of a non-existent map and the specific relationships of that map's district(s) to the constitution and laws. During the last redistricting cycle, this Court made clear that determining whether a map complies with the Florida Constitution or the federal constitution is a "fact-intensive" inquiry that can be resolved only after "an adversarial trial." *See, e.g.*, *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 399 (2015). Here, the Governor presents the Court with no facts other than an outline of the existing congressional district 5. And, of course, because of population changes (about which the Governor says nothing), whatever map the Legislature draws will not be the same as current district 5.

Under the guise of requesting an advisory opinion and without the benefit of any factual record, the Governor asks the Court to

opine on specific legal questions that do not relate to his "powers and duties." His questions illustrate the reason that the gubernatorial right to an advisory opinion is so limited: the Governor is asking this Court to render a substantive opinion in a vacuum. Answering the questions through an advisory opinion and without a specific map would fly in the face of this Court's precedent and require this Court to revisit its decisions from the last redistricting cycle—without the benefit of a complete (or even partial) record. Doing so would be contrary to this Court's responsibility to decide upon the constitutionality of any congressional reapportionment by the Legislature based upon the facts and the law.

CONCLUSION

The Interested Persons respectfully submit that the Governor's February 1, 2022 advisory opinion Request is not within the purview of article IV, section 1(c) of the Florida Constitution, and that this Court should not provide an opinion in response to the Request.

Should the Court determine that it has jurisdiction to issue an advisory opinion, the Interested Persons respectfully request that they be given an opportunity to brief the merits of the Governor's questions.

DATED: February 7, 2022

Respectfully submitted,

s/Henry M. Coxe III

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2022, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court by utilizing the Florida Courts E-Filing Portal, which will send a notice of electronic filing to all counsel of record including:

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I hereby certify that this brief was typed in Bookman Old Style 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b).

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